THE FUNCTION OF COMPARATIVE LAW

WITH A CRITIQUE OF SOCIOLOGICAL JURISPRUDENCE

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SOCIOLOGICAL JURISPRUDENCE, LEGAL SOCIOLOGY AND COMPARATIVE LAW

ONE of the first things to strike a foreigner who comes in contact with American lawyers is the general lack of interest in questions of comparative law. This indifference seems to be chiefly due to a failure to understand the real functions of that science in the modern world. Most see in it nothing more than an amusing puzzle, the chance to satisfy an idle curiosity. Nearly all the books and courses which have dealt with the subject amply confirm this estimate.

We have come to a period when, in most countries, there is a real inadequacy in the law, a failure to reach scientific standards and to meet social ends. From that follows a general dissatisfaction. This dissatisfaction seems to be a consequence of the method used. Law is, in one sense, a social medicine. Let us see what has been done in medicine. For centuries, when a new case was brought to a doctor, he tried to gather what he could out of his past experience by analogy, or to get an inspiration from the "spirit" of his profession, or to use the common sense he had left, and then, trusting the gods, he tried a remedy. If the patient became worse, the doctor tried something else. But in the nineteenth century, when anatomy and physiology began to develop, the doctors quickly availed themselves of the new knowledge, and took advantage of the facts discovered by these sciences to direct their art. Medicine is now an "art" based on "factual sciences," and all doctors have a very substantial knowledge of these sciences.

What has been done in that social medicine which we call law? More than fifty years ago men began to study the social organism

inductively, with scientific methods. Patiently, by monographs, some endeavored to discover the general laws which govern the mechanism or the function of this or that social institution, while others tried to establish methods and to evolve a program. These pioneer studies have established that wherever we find a social group, we have, in one form or another, religious, moral, economic, legal organisms and functions as automatic products of the synthesis obtained by the mere fact that men are together. This synthesis is a generator of forces. A social fact is an external force which coerces the individual.[1] Let us take an example. If a man of the world decides to walk down Fifth Avenue without a hat, he will certainly feel some resistance in executing his project; shame, fear of ridicule, etc., are the individual effects of forces outside the individual, forces which are just as real as the force of the wind which threatens to blow his hat from his head. If the same man tries to break the law, he will encounter contrary moral forces of the same nature, but much clearer here, because their sanctions are accentuated by physical sanctions. All of these forces, immaterial as light, electricity, or universal attraction, are yet as real as those, and, like them, submit to generalization in the form of scientific laws.

All that is by no means new.[2] And if law be looked upon as a system of forces which are bound by certain general, necessary laws to act and react in definite ways toward other social forces, it seems to follow that the lawyers should do what the doctors have done: bend their efforts to the discovery of the scientific facts which limit and direct their control over these forces. But the lawyers have failed to enter in the way which was offered. Hardly anyone has tried to study inductively legal facts, in connection with other social facts, in order to discover the necessary laws of their relation.

In spite of the great achievements of the school of "sociological jurisprudence," it seems doubtful whether it can help very effectively in this task; for, while it is undoubtedly a school of jurisprudence, it is hardly a school of sociology. Instead of deducing

[1] See E. DURKHEIM, LES RÈGLES DE LA MÉTHODE SOCIOLOGIQUE, chap. I.

[2] See, for instance, the book of L. LÉVY-BRÜHL, MORALE ET SCIENCE DES MŒURS, 5 ed. (1913), which propounds similar ideas in the general field of moral facts.

the law from abstract principles, the members of this school fix their attention upon the *functions* of the law, its ends, its practical results. This is, indeed, a proof of practicality and common sense. But the history of the law shows a constant swing of the pendulum between periods of growth where the tendency is practical and teleological, and periods of organization where the tendency is logical and systematic. It is this opposition which is now expressed in books under the names of "analytical jurisprudence" and "sociological jurisprudence." But the last name is rather misleading, because the work of this school seems to differ from sociology, both (1) in its *method* of observing the facts, and (2) in the *end* it has in view.

(1) As to the *method*, sociological jurisprudence claims the title of "sociological" because it looks at the function of the law more than at its logical unity. But its practical tendencies, its pragmatic flavor, its teleological philosophy, show the psychological behavior of its members, their personal tendencies, but do not, *ipso facto*, create a scientific method, a new technique. Among the doctors of the middle ages, also, some were more inclined to deduce their science from Aristotelian premises, others preferred to take more into consideration the effect on the patient. But the latter have never constituted a physiological school. Sociology, as truly as physiology, is based on facts. Like all other sciences, it has a great preliminary work to do in clearing the ground of what Bacon calls "anticipationes," [3] *i. e.*, the popular notions that everybody already has of the facts, — notions which, in the moral sciences, are taken very often for the facts themselves. In social sciences the facts, far from being isolated from one another, are integrated together in a very complicated way; but popular conceptions take chunks from this complexus, and lump together facts which are quite different one from another. In other words, the popular notions cut reality as a butcher cuts beef. And just as a physiologist has to do his own cutting in a different way, the sociologist has to work out his method, his objective criteria, in order to isolate the real facts.[4] Unfortunately, nothing of this sort seems to be

[3] NOVUM ORGANUM, bk. 1, aphorism 26.

[4] This idea is demonstrated at length and very clearly in E. DURKHEIM, LES RÈGLES DE LA MÉTHODE SOCIOLOGIQUE, ch. II. See also POUND, THE SPIRIT OF THE COMMON LAW, 213 *et seq.*

attempted yet in "sociological jurisprudence," which looks at society as everybody does, and by doing so, uses from the very beginning a method which can hardly be termed sociological.

(2) Sociology is an inductive science; that is, its *end* is to discover by observation the general laws which control facts. Curiously enough, the jurisprudence that we are now examining does not seem to aim at the discovery of such laws.

Here we encounter the very interesting "theory of social interests" of Dr. Roscoe Pound, Dean of the Harvard Law School.[5] This theory has been so "dephlegmatizing," and has done so much in preparing young lawyers to meet the exigencies of the present day, that every thinker must acknowledge its value, proved by its success. But all human creations, especially the first steps in a new field, are imperfect. In order to live, they must change; and criticism may perhaps help them to change. So the following criticism, far from desiring to destroy something which is full of life, seeks rather to promote its evolution. Therefore it does not purport to be conclusive, but attempts to point out difficulties and defects of the system. Mr. Pound's theory is composed of two different elements: (A) an attempted explanation of what actually takes place in the framing of the law, and (B) a rule of action, a suggested method of approach to solve the problems of law in the way which seems right to him.[6]

(A) Let us examine the first point, which I think may be fairly stated as follows: The cause of the substance, form and evolution of the rules, principles, and standards in the law is mainly a compromise, a balance of all the social and individual interests involved in the social facts which are to be regulated.[7] Such a theory attempts to give a keynote to the entire legal process, and

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[5] The principal articles expounding the system are: Pound, "Do we Need a Philosophy of Law?" 5 COL. L. REV. 339 (May, 1905); "The Scope and Purpose of Sociological Jurisprudence," 24 HARV. L. REV. 591 (1911); 25 HARV. L. REV. 140 (1911); "Legislation as a Social Function," 7 PUBLICATIONS OF THE AM. SOC. SOCIETY, 148 (1912); "Juristic Problems of National Progress," 22 AM. J. SOCIOLOGY, No. 6 (1917); "A Theory of Social Interests," 15 PROC. AM. SOCIOLOGICAL SOC. (May, 1921). See also POUND, THE SPIRIT OF THE COMMON LAW; POUND, INTRODUCTION TO THE PHILOSOPHY OF LAW, chap. II.

[6] We shall use the word *morale* in referring to this second part of the theory.

[7] This short statement is a little crude. Mr. Pound, in fact, does not state it in such absolute form. See INTRODUCTION TO THE PHILOSOPHY OF LAW, chap. II.

looks very like the general explanations of the physical world attempted by physicists in the middle ages. If one considers how infinitely more complex are social facts, one cannot help thinking that so sweeping a generalization risks being a negation of sociological method, that it either is premature or does little more than restate the problem.

Such an explanation raises two lines of difficulties: (1) one springing from the notion of *interest;* (2) the other from the notion of *balance.*

(1) If it were true that Mr. Pound means [8] by "interest" what everyone means by the word, his explanation would be by means of *final* causes and not by means of *efficient* causes. That would be to a great extent the negation of sociology, which starts from the assumption that a social fact is a force that must be explained by antecedent forces. It may be to our interest that men have keener eyes and stronger hands, but the mere fact that there is an interest does not help us. We should have to have the optimistic philosophy of the "Candide" of Voltaire in order to admit such an explanation. Such was the weak point of Jhering — but apparently not of the theory that we now analyze. Such a theory logically presupposes, moreover, that we know what the interests of society are. For such knowledge there are two requisites. The first is, that we have an ideal of what society should be. But such an ideal is a metaphysical conception; and if legal sociology is to be a science, it cannot be based on any metaphysical conception. The second requisite is that we know what the final results of any given social facts will be. To make the point clear, let us take an example. Suppose we can establish that the immediate results of the Eighteenth Amendment have been a decrease in the number of crimes and a higher average of expenditure for the education of children between eight and twelve. It does not follow that the prohibition law conforms to the interests of American society. It may turn out later that such a law, in taking from a man the choice which he formerly had, of being sober or not, has broken the proper equilibrium between the respective functions of law and morals, and in so doing has worked more harm than good.

[8] This hypothesis is taken here only in order to allow us to present a more complete analysis of the idea of interest, but we are persuaded that Mr. Pound does not take the word in this sense.

When a judge decides one way or the other, he cannot be directed by the truest interest of society because such interest can only be the final one, and the judge knows only the immediate ones. Of course, when legal sociology is wholly developed, he may have the means of knowing the final interest. But as, at the present time, we do not have the means of reaching these final interests, law cannot be a balance of these final interests: the only real ones.[9]

Mr. Pound has seen these difficulties, and gives to the word "interest" the sense of claims or demands made by the members of the social group. This sense of the word obviates the difficulties that we have pointed out, but it raises immediately other difficulties. A claim formulated, for which men struggle, is indeed an active social force, but it is necessarily a *conscious* claim. Therefore the theory tries to explain the law (a) by moral causes alone (excluding physical causes; which seems doubtful, at least, from what we know in other branches of sociology), and, (b) among these moral causes, by the conscious phenomena alone (excluding the whole unconscious field).

This second implication cannot stand without modification. We already know that in society, as in the individual, the unconscious forces play by far the greatest rôle. That is why Mr. Pound seems rather ready to admit that by "interests" he means all claims of society, whether conscious or unconscious. But a claim, in its very nature, is something formulated; you cannot have a *de facto* claim that no one has ever made. If what is meant is the obscure needs of society, this must mean one of two things: (a) the things that society really needs without knowing that it needs them, and that is simply to return to the first sense of the word "interest" which we have already criticized, or (b) the obscure forces which drive society, unconsciously, in a certain direction.

This second meaning is very fruitful, and brings us in sociology to the position reached by modern psychology, where there is a tendency to consider that an individual's decision is by no means a mere balance of various motives, existing independently, and

[9] We cannot transform this analysis into a metaphysical discussion, but we ought to state that our point of view by no means involves a negation of any dualist metaphysical system.

offsetting one another, but that it is an expression of the whole personality, like the descending current of a stream. A decision, that is, is no more made of separate motives than a river is made of separate pails of water. But if law is a product of the social group in its unity, in its personality, so that it is artificial to speak of motives having a separate existence and counterbalancing each other, the ground is cut from the rule of action which forms the second part of Mr. Pound's theory, for that seeks consciously to balance these diverse claims as separate elements. Moreover, although such a principle is intensely interesting in itself, it cannot lead to any method of approach to a specific problem, since it only states that all solutions are the product of the whole organism.

(2) The second main difficulty raised by Mr. Pound's explanation of the legal process is the notion of balance. In order to affirm that a balance is determined by what is in the two scales, it seems that one must know the relative weight of these things. Of course, the word "balance" does not mean, in Mr. Pound's system, a strict mathematical process; it means an endeavor to harmonize interests. But so far as it means anything, it must be based on a knowledge of the weight of the different claims. Apparently, up to the present time, few efforts have been made to solve these problems.[10] For instance, between two claims equal in every respect except that one represents a force of the past, the other a new-rising force, which shall prevail? In other words, is there not within some claims a vitality distinct from their content, a mysterious force of youth that pushes them forward? Does a claim formulated by a hundred fools have more "weight" than a claim formulated by ten intelligent men? Do the claims of an organized body have more influence than do those of unorganized social bodies? Does a claim which would tend to a worse functioning of society lose *ipso facto* some of its weight, even if no one, at the time, is aware of that tendency? Does persistence outweigh clamor? These questions indicate that their answers must be a condition precedent to any warranted affirmation that law is the result of a balance of interests. If we have not even a rough idea of what the weights are, it is logically impossible to say that any fact is the result of the weighing.

[10] In Chapter VIII of his THE SPIRIT OF THE COMMON LAW, Mr. Pound seeks rather to find out what these interests are than to discover their relative weight.

To say that law is a mere balancing of interests involves the postulate that the legal system is an impartial, impassive receptacle in which more or less automatic reactions take place. But, as a matter of fact, we know that the legal machinery of a given society is very much like a living body with its reactions, its currents, its temperament, its prejudices; that it is extra-sensitive to certain things, blind to others. When reality is presented to the legal eye, it is as much distorted as it is to the human eye. The symbol of justice as it is actually administrated is not the goddess disinterested and infallible, holding the scales, but rather the Gaul who throws his sword into the balance. In other words, it seems to us that the theory of Mr. Pound does not see the legal system, itself, as a dynamic system, involving as it does forces entirely *sui generis*. This would make a serious gap between sociological jurisprudence and legal sociology.

This critique does not mean that we deny all truth to the system. We believe, on the contrary, that if it fails to explain the real causes of the birth of jural phenomena it gives a good explanation of the *continuance* of these phenomena when once created. In the social system, as in the physiological system, there is in the majority of cases (but not always) — when the being is normal — an internal teleology, a quality inherent in everything living, which tends to eliminate the noxious elements and to keep the useful ones.[11]

(B) On these attempted explanations of facts Mr. Pound builds a rule of action, a method of education, and says to the future lawyers, to the prospective judges, "You ought to balance the different interests at stake, in the case that you have to decide, and give the solution which will be the best compromise of all of them."

Of course, as soon as Mr. Pound leaves the explanation of facts and begins to direct future actions, he is out of the field of sociology, and is a moralist and a metaphysician. Let us follow him for a moment in that field. Up to this time we have been considering Mr. Pound's attempted explanation of the facts; by successive deductions we came to the conclusion that the word "interest," there, could only mean that complexus of conscious and unconscious forces which forms the whole social personality. As we turn to the second part of the theory, the rule of action, the first thing that

[11] Moreover, we believe the system much more adequate to explain phenomena of private international law. We shall analyze this point later in a separate study.

strikes us is that the word "interest" cannot mean here what it meant there. The reason is that men cannot balance unconscious forces which, by hypothesis, they do not know. So we are led to consider again the two other meanings of the word "interest."

(1) If it meant the real final interests of society, the theory would be lame, because it would not give us the means of knowing what these interests are, since it gives us no plan of social reconstruction. It would fail to point to any absolute values, to give us an end to strive for. And if the answer is that by interests is meant simply the things which help the normal functioning and development of society, then we would reply that such rule of action is no more efficacious than the *morale* of a professor of medicine who should tell his students to apply the remedies best fitted to promote the health and evolution of the human body. Every one agrees to that, but it is by no means a method of approach for the discovery of a remedy. Such discovery presupposes a great development of all social sciences.

(2) But the doctrine means, as we understand it, the *de facto* claims made by members of the social group, and so comes to this: "Try to satisfy everybody if you can." Such a theory is based on William James's idea that any demand made by a human being legitimates itself, and that it is for those who deny its satisfaction to show cause for the denial.[12] Such a point of view appeals very strongly, at first, to the human consciousness; but on closer analysis grave objections appear. We do not mean that these objections are decisive, but only that they are serious enough to make us hesitate to follow such a rule of action without proof of its validity. The objections may be formulated as follows:

(a) In certain periods of history it seems that all the claims, all the demands of society, combine to further the destruction of that society. Such was the case in the later periods of Babylon, Greece, and the Roman Empire. So, to allow the law to be directed by the weight of conscious claims would often be to precipitate a nation toward its own suicide.

(b) This situation is only an exaggeration, in a decadent period, of what happens more or less in any society: in a normal being,

[12] JAMES, THE WILL TO BELIEVE, 195–206.

whether an individual or a group, the majority of his desires tend to secure his conservation and evolution; but many demands, needs, tendencies, on the contrary, work for his destruction. The individual's desire for smoke, spirits, and nervous excitement may be instanced; that of society for capital executions, scandals, etc. The majority of the demands will usually inhibit these destructive demands, but there will be frequent cases where this inhibition will not occur, because the contradiction between the majority of the claims and the present demands will not be perceived by the subject. The destructive desire will triumph because no other demand will arrive in due time upon the scale. That is the cause of most human misery. And this psychological impossibility of seeing what the real conflicts are is so inherent in our mind that in practice every rule of individual conduct, every system of *morale* based on a harmony of desires (hedonism), has always been a failure. The systems which have succeeded in really directing life have always been based either on an end or on absolute values. Even if such a balance of interests were theoretically a good system, it would be a dangerous one, because if we are looking for a rule of action we are bound to take the practical point of view, from which we see, as a fact, that if a man has no absolute standards, a mere idea of compromise will be insufficient to direct his action because such an idea requires too great a knowledge of this tremendously complex net of claims, and too high a mental honesty. So an ethical norm without an imperative, a law without a plan of social progress, is, from a purely psychological point of view, a body without a spine. After all, it was a law which obeyed the preponderance of claims which condemned Socrates. Claims, by the very fact that they are formulated, heard, and approved, are already something of the past; if we have not a system which gives us a way of enforcing those feeble, new-born claims, which contain the future in germ, which are full of vital force, our mind cannot be satisfied by such a system. And, as is pointed out above, this part of Mr. Pound's theory is a metaphysic; hence the fact that it does not satisfy our mind is a sufficient objection.

(c) If the satisfaction of a claim does not necessarily mean happiness, if some of our claims directly tend to our destruction, why ought a claim be satisfied for the mere reason that it is a claim? Nowhere in the system do we find any justification for this.

We must therefore conclude that we have reached the metaphysical basis of the theory: if a claim is not to be justified by the result that it can bring about, it must be justified in itself. What is it in itself? A mere expression of will. Therefore, at the bottom of the theory we find a voluntaristic philosophy; a glorification of the will, as will.

(d) The foregoing argument is based on the supposition that claims and happiness are not necessarily linked together. If Mr. Pound denies this, and bases the value of the claims on the intrinsic value of happiness, the difficulty becomes both (1) metaphysical and (*b*) sociological.

(*a*) From the idea of happiness,[13] Mr. Pound's theory seems to pass to the idea of the greatest happiness of the greatest number. We do not say that such passage is theoretically impossible, but we contend that it needs to be demonstrated. From the mere fact that we may regard happiness as the supreme good to be pursued by law, it does not follow that our final goal is the greatest happiness of the greatest number. It is at least conceivable, if happiness is the supreme aim, that we ought to try to realize the highest form, the best quality of happiness; that we ought to climb the mountain as high as we can. It might well be a matter of indifference that we must sacrifice the mediocre happiness of many men in order to create a more perfect happiness in some,[14] since it is not men who are the final aim, but happiness. Happiness is the feeling of relation between one's ideal and one's realization of that ideal. Therefore a fool may derive the same amount of happiness from owning an automobile as a great and learned man from making a discovery.

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[13] We do not here analyze the value of happiness as supreme good, because we are going to explain that the supreme good is, for Mr. Pound, something else than happiness. But if that supreme good were happiness for him, it would raise new objections. We may indicate two of them: (1) Happiness is only a psychological equilibrium which may be brought about in a thousand different ways. So the concept itself is an ambiguous one. (2) Happiness is a rather low ideal, perhaps. A well-known astronomer said lately, that if his only aim were human happiness, he would immediately cease to work. The importance given to the idea of happiness when it is not a mere popular conception is a professional deformation of the lawyer's mind.

[14] And this suggestion is not so strictly theoretical as it may seem at first: the policy of keeping the white race from any mixture with the black one is based, among other causes, on the necessity of protecting the integrity of what is considered the higher type.

Shall we sacrifice the happiness of the hundred fools for the happiness of the learned man?

If we do, it means that man, as such, is not a means, but must be an end. Therefore if Mr. Pound bases the value of claims on happiness, he returns to Kantianism; if he bases it on the will, he goes back to Hegelianism. Of course, he can conceivably escape both systems by creating a new metaphysic. Our contention is simply that at the bottom of Mr. Pound's *morale* there is a metaphysical principle which must be seen and explained.

(*b*) Moreover, the end of the law he depicts is one that would hardly be acceptable to any sociologist. In order to explain the objection of the sociologist let us make a comparison between an individual body and a social body (and this does not involve the adoption of the organicist sociology). Physiologists and doctors consider the human body as a whole; they do not consider the welfare of the human being as the sum of the welfares of all the cells taken separately. And to insure the proper functioning of the body a surgeon will often destroy many thousands of cells. When he hesitates, it is not out of consideration for the cells, but out of consideration for the individual. A sociologist considers an individual in society much as a physiologist considers a cell in the individual. Of course, the problem is different, but it is so for emotional and moral reasons. So far as scientific method is concerned, the problem which those dealing with social facts have to face is the problem of the functioning of an organism. This problem is quite different from that of individual happiness. To consider that the end of a social organization is the individual (whether his happiness or his will) is to repeat the fault of Bentham, and to deny one of the fundamental principles of modern sociology.

(e) Even if such a system were, in the abstract, the best, the main objection to it would remain: it is not worth trying if it does not fit the facts. If the *de facto* claims of society do not give us an account of the framing of law in the past, these claims cannot frame it for the future.

A rule of action can only tell us to act according to the natural laws which govern the facts on which we wish to impose our action. A theory that does not fulfill this requirement runs the same dangers as a metaphysical principle; if we try to deduce from it a technique,

and solutions for the problems of law, we encounter the very objections raised against a jurisprudence of conceptions.

(f) There is a further difficulty apparent in the very term "sociological jurisprudence." Sociology is a science of facts, which in itself does not give any rule of action, and is an entire stranger to philosophy. Every lawyer has a certain amount of jurisprudence, just as every man has his philosophy, whether he wants it or not; but as soon as one is in the domain of jurisprudence, he is beyond the field of sociology.[15]

If the difficulties of the system have not been pointed out, it is because the atmosphere, the spirit, which are behind the present school of jurisprudence, are very different from the atmosphere and spirit that we find behind the former schools. When the sociological school appeared there was a real dissatisfaction with the law, because lawyers were more or less thinking in their own "universe of discourse"; they were looking more to the logical unity of the law than to its function; they failed to realize that law is made for human beings who are forever changing, while logic is made for eternity only. At the end of the last century there was everywhere in the civilized world a gap between what law did and what the people asked it to do. There was a real danger and an emergency. An endeavor such as we are advocating here would never have met the problem, for it would have been far too slow. It will always be to the great honor of sociological jurisprudence to have gathered liberal and open minds together, to have given the law a refreshing bath of humanity, common sense, and realism, and to have helped to dissipate the danger which was threatening modern society. This school has already achieved results of the most profound significance, and will achieve others — by the life that is in it and its enthusiasm. Thus it has drawn liberal minds together, and in so doing may have blinded them to the weaknesses of the system. Sociological jurisprudence, like all human creations, is not a permanent thing: it may represent the best forces of the present generation; it will certainly dissatisfy the next. Excellent doctrine for an emergency, we should be deceived in relying on it more permanently. Far from desiring to burn others' crops, we

[15] The word "jurisprudence" has five or six different meanings, but each of them seems to be included in the scope of the present objection.

should like, in the autumn, while others are still gathering the fruits, to do something to help prepare the crops of the coming year. We ought to work not only for the solution of our own problems, but also to put in the hands of our grandchildren the means of meeting the difficulties of their generation.

If sociological jurisprudence, in its present stage, seems unable to help us discover the method of legal sociology, we are obliged to find that method ourselves. The scope of this article is by no means to make a complete draft of such a method. It is submitted that such a draft cannot profitably be made in one piece.[16] We wish merely to indicate the place of comparative law in legal sociology. Aside from the big problem of finding our data, our method must, generally speaking, be determined by our end. As stated above, our end is to discover general laws which govern the legal world. Such laws, like all natural laws, will express relations; and such relations may be either of one legal fact to another legal fact, or of a legal fact to a social fact that is not legal (it may be economic, moral, religious, political, etc.).

From this two consequences follow. The first is that no effective work can be done if we have not on hand all the different classes of facts which obtain in the society that we want to study. And as, of course, such work is beyond the capacity of any man, the solution of the problem is to apply to purely scholarly work the business methods of coöperation and organization. To take a concrete case: We want to study the general laws which govern the relation of the legal institution of marriage to the other social facts. Apparently we must have, working together, a group of men, all sociologists, but each specialized in a different branch of sociology. In a given society, one would study the moral phenomena involved in the institution; another, its religious aspect, etc. Even if, in a particularly narrow study, one man had the capacity for studying these different points of view, he should not do so, because it is essential that the man dealing with the moral side of this particular case have an intimate knowledge of the moral structure and function of the whole society which is under consideration, and see things from the inside. Therefore, the first

[16] A method is framed little by little, inductively, by the development of the science itself. The failures and successes of each day lead to a perpetual modification and adaptation of the methods and technique used.

consequence which we draw from the statement of our aim is that no fruitful work can be done if the legal scholar stays in his study. In social sciences we can no longer work like the artisan of the middle ages, doing all his labor alone in his shop; we must be of our own time in framing our methods.

The second consequence is that the aim of legal sociology gives to comparative law a very important function. If there are natural laws which govern the forces which come into play in the legal world, these can only be discovered inductively, at least for a long time (all inductive sciences, on reaching a certain stage of development, become to a certain extent deductive). The classical steps recognized in the inductive method are: (1) observation, (2) hypothesis, (3) experimentation, (4) formulation of a general law. One sees immediately that the third step presents a difficulty: how can we make experimentation in social facts? How, without the power of a Nero, turn a society into a laboratory? The physiologist and the psychologist can work on animals because there are substantial similarities between men and animals from these two points of view, but there are practically no such similarities in the social field, for we do not find among animals religious, moral, artistic, political, or legal phenomena which present resemblances that are fruitful for study. Fortunately this objection is not fatal. Astronomy, to the extent that it is an inductive science, is also obliged to dispense with experimentation; it is, nevertheless, a science. The astronomers have overcome the difficulty by replacing experimentation by what is called in French *recoupement*.[17] It seems, at the present time, that this is the only method open to the legal sociologist; and such *recoupement* must be conducted somewhat as follows: We study one institution in a given society, and we discover that certain facts are altered when certain changes occur in other facts (observation); then we assume that these "concomitant variations" are not accidental, but that the first are the causes of the second (hypothesis); then we try our hypothesis on some other system of law, and it is confirmed with some slight differences (*recoupement*); then, taking account of these differences, we formulate the general law. With only one observation there is a methodological impossibility of going further than the hypothesis.

[17] *Recoupement* is the method of verifying an hypothesis by successive observations of the same phenomenon from different angles.

History cannot give us the material for scientific *recoupement*, because if our field of observation is always the same society, there may be certain factors which remain always the same, which we ignore, and which make the facts appear to us in a way that necessarily leads to error.

If scientific *recoupement* be one of the main functions of comparative law, this fact determines to a great extent what the method of comparative law must be.

First, it must be clear that a comparison restricted to *one* legal phenomenon in two countries is unscientific and misleading. A legal system is a unity, the whole of which expresses itself in each part; the same blood runs in the whole organism. Hence each part must necessarily be seen in its relation to the whole. An identical provision of the law of two countries may have wholly different moral backgrounds, may have been brought about by the interplay of wholly different forces, and hence the similarity may be due to the purest coincidence — no more significant than the double meaning of a pun.

Second, the unity of a legal system is often more apparent than real. The significant forces that frame new law are not only legal forces, but also moral, economic, religious, etc.; in a word, all social forces, in different proportions, come into play in each social phenomenon. So that, if the point of view of legal sociology is to be a dynamic one, all these forces must be taken into account and weighed in the process of comparison.

This indicates the immensity of the work that has to be done, but it is not a reason for discouragement; all scientific work is a process of slow building by many artisans. Are physicists discouraged because they have no hope of solving all the problems of the universe, but must content themselves with the discovery of laws which are usually of narrow and very definite scope? If lawyers are less easily resigned, the reason is evident: In past ages, every one felt at liberty to speak about astronomy, the laws of nature, and of the mind, etc. Step by step, science has expelled the laymen from most fields. At present no one who is not trained in the methods and technique of physics would attempt to discover the secrets of nature simply by looking about him at the spectacles which nature offers. But each time that science says to the layman, "A gift of observation and good common sense are not enough to

deal with this kind of subject; you must either get out, or bind yourself to a hard, strict technique, and abandon your bright and wide literary viewpoint," the layman feels bitter until he grows accustomed to the idea. The layman has been expelled successively from all these fields; almost the only one that remains to him now is the field of social facts. That is why he rushes into this field, to make it the subject of all his conversation and to publish shelves of books on jurisprudence, politics, and moral questions. If the sociologist in turn comes and says, "If you want to study social facts scientifically, your present method is illegitimate," he will raise a temporary storm of bitter resentment. But when one considers how little efficient work has been done in comparative law up to this time, and how much other sciences have done for the welfare of mankind, the magnitude of the new endeavor should not be a cause of discouragement but a source of joy.

Even if such a science had no practical bearing, it is certain that it would be studied, because there is an irresistible current in mankind toward knowledge. As soon as it was known that there were general laws governing stars distant from us by forty thousand years of light, men were found willing to devote their lives to the study of such laws; as soon as the site of ancient Babylon was located, men also were found willing to give their energy to exploring the mysteries of the city. It is a psychological fact that there is enough idealism in the world, and enough dislike of being surrounded and led by mysterious forces, to promote the study of such a science as the laws of the law. But our position is stronger, because such a science has very important practical consequences. Actions of legislatures and of courts often mean dishonor, tears, ruin, death; and yet these actions are not based on exact, certain knowledge that the suffering imposed is necessary or beneficial to society. They are made in the dark; they are based on haphazard opinion. The coöperation of medicine with physiology and anatomy has meant much less suffering for mankind. When the laws come to be based on the scientific knowledge of the effects, limits, and reactions of law, when men cease to be the guinea-pigs of legislators, there will probably be more happiness among us, more efficiency in the working of our social organism.

If the legal sociologist must be essentially a man of science, his training must be quite different from that of a lawyer. He must

be, above all, a man trained in inductive methods; and he must have a serious knowledge of psychology and of social sciences. Of course, he must know enough law to be able to understand its working and technique, and the relation of the problem he studies to other legal questions.

To sum up, though it is idle to compare by mere curiosity without being able to go beyond the comparison, it seems that comparative law is a necessary step in a highly scientific study of the law.

II

Uniform Law and Comparative Law

From a more directly practical point of view the function of comparative law seems equally important.

It is strange that there is no portion of the law which is uniform in all nations, *i. e.*, no body of rules to direct the actions of men in the same way in all civilized nations. What we find, in fact, is that each nation frames its own law as if it were the only nation in the world; it regulates the law of bills and notes, for instance, as if the bills and notes circulated only within its boundaries. As it is known to every one that in actual business, notes have an international circulation, we come necessarily to a conflict. And as nations know that conflicts between their respective laws are economic conflicts, and that such conflicts are one of the main causes of war, they try to pour a little oil where there is friction; and that is what is called "rules of the conflict of laws." Such rules try eternally to palliate the evil without reaching the cause; they eternally try to fill up the Danaïdes' barrel, while it seems by no means impossible to put a partial bottom to this barrel. It is generally admitted that states are dependent upon each other to a greater or less extent in their economic life. Nevertheless, law is framed by each state, in complete isolation from the others. A big corporation which is doing business in ten different nations must see its rights and liabilities vary greatly from one place to another. Granting that the municipal law of a state should not be imposed upon it from the outside by a superstate, we submit that the proper method of approach to the problem of framing new law in these commercial and economic matters, which by their nature are international, is by taking

account of the laws of other countries, and by aiming at uniformity. Here, again, we see that law is behind the times, and has not been able to mold its methods to meet the economic changes. Nevertheless, events like the adoption of the Uniform Sales Act and of the Negotiable Instruments Law clearly show that the law is bound, sooner or later, to yield to the pressure of other social facts to lose its flavor of provincialism, in framing what are really the first pieces of international uniform law. What is done in this line within the United States is only a sign of what is sure to come between nations bound together by no federal link. A state of the United States is no more bound to adopt the Sales Act than, for instance, is France. The social interests that would impel France to adopt a uniform commercial law are substantially of the same nature as those of any state of the United States.

We believe therefore, first, that the fields of the municipal law which have an international importance will become each day larger and larger; second, that in any such part of the law the proper method of framing new law is to consider the corresponding provisions of the laws of other countries, and, if it does not conflict with strong domestic interests, to aim at greater unification; third, that in these fields the tendency toward uniformity is inevitable and increasing. It seems that it will be a chief duty of the younger generation of jurists to promote the interest in this real, new uniform international law, in the fields where it is possible and advisable to realize it.[18]

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[18] This theory does not purport to be new. It was formulated by Cicero, and in modern times may be found, for instance, in PFEIFFER, DAS PRINZIP DES INTERNATIONALEN PRIVATRECHTS, pp. 78–79; COHN, BEITRÄGE ZUR LEHRE VOM EINHEITLICHEN WECHSELRECHT, § 8; J. A. LEVY, WET OF TRACTAAT? (La Haye), pp. 67 *et seq.*; JITTA, LA MÉTHODE DU DROIT INTERNATIONAL PRIVÉ, pp. 227 *et seq.*; ASSER, DROIT INTERNATIONAL PRIVÉ ET DROIT UNIFORME; JITTA, LA RÉNOVATION DU DROIT INTERNATIONAL (La Haye, 1919), pp. 142 *et. seq.* And, in fact, there have been several attempts to start in this line. Congress of Gand (1863), on the "lettres de change" (ANNALES, 1863, pp. 203–216). — Convention de la Haye, Brême, Antwerp, Francfort, London (REVUE DE DROIT INTERNATIONAL, t. V, 592–702; t. VII, 307–310; t. VIII, 683–689; t. IX, 405, 415; t. X, 656–661; t. XI, 440–442.) [An historical account of the movement toward uniformity up to 1879 is to be found in an address of Georges Cohn, at Vienna, on 18th of March, 1879: Ueber international Gleiches Recht]. International Maritime Conference of Brussels, 1911. International Labor Conferences of Washington, 1919, Genoa, 1920, Geneva, 1921 (under Part 13 of the Treaty of Versailles).

The place and function of comparative law in such a program is easy to understand. If one admits that a legal system is a system of forces, the conclusion follows that a uniform law can by no means be an ideal law framed freely according to ideal theory. The only thing that can be done is what Mr. Williston did: take into account the different theories and provisions of the states, and frame a law which is inspired by certain directive ideas but is necessarily a compromise. So, the condition precedent of any effort toward a better international legal situation is the study of comparative law for the purpose of understanding the various laws. Only thus can a sound foundation be laid on which to build some uniform international laws. If these laws are needed directly by the business world, they are needed indirectly by the whole world, because divergences in laws cause other divergences that generate unconsciously, bit by bit, these misunderstandings and conflicts among nations which end with blood and desolation.

III

Legal Education and Comparative Law

But while the two functions of comparative law outlined in the first two parts of this article are vital for the development of the science, they would interest only a small class of scholars with special training and aims. But there is a third function of comparative law which makes it a desirable item in the curriculum of all law schools of high standing.

As Dean Ames put it, the great law schools try less to give the knowledge of the law than to infuse in the mind of the student the "spirit" of the common law.[19] Taking this method of education as a fact, without assuming to judge its value, it is clear that there is in it a danger. To be possessed of the spirit of the law is (I state here my personal experience), to a great extent, to live in the "universe of discourse" of the law, to indulge in certain kinds of reasoning for the beauty of it, to be satisfied with the law as it is; to attach to the past of the law, to the binding forces of precedent, importance liable to paralyze the progress of the law. These defects may be trifling in the periods when society, not in rapid evolution, is organizing pre-acquired assets. But in a period

[19] 31 Reports American Bar Ass'n, 1025 (1907).

like the present, when many social organisms and functions are growing very rapidly, often in unforeseeable ways, when the law, in many points, is already far behind the times, when there is a rising discontent with the inadequacy of the law to meet the new conditions, it seems that the first duty of any law school, either toward the science of law at large, or toward its own country, is to train the new generation in such a way as to enable it to meet the entirely new situations created by the new and profound changes in modern society.

When one is immersed in his own law, in his own country, unable to see things from without, he has a psychologically unavoidable tendency to consider as natural, as necessary, as given by God, things which are simply due to historical accident or temporary social situation. If I may state a personal experience, I never completely understood the French law before coming to the United States and studying another system. History of law seems inadequate to give to the student this sense of relativity, because in history we often deal with forces which are not yet dead, which still unconsciously bend the mind of the student in a certain direction. To see things in their true light, we must see them from a certain distance, as strangers, which is impossible when we study any phenomena of our own country. That is why comparative law should be one of the necessary elements in the training of all those who are to shape the law for societies in which every passing day brings new discoveries, new activities, new sources of complexity, of passion, and of hope.

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